

PANEL I OF THE HEARING OF THE SENATE COMMITTEE ON THE JUDICIARY  
SUBJECT: FISA AMENDMENTS: HOW TO PROTECT AMERICANS' SECURITY AND  
PRIVACY AND PRESERVE THE RULE OF LAW AND GOVERNMENT  
ACCOUNTABILITY CHAIRED BY: SENATOR PATRICK LEAHY (D-VT) WITNESS:  
KENNETH WAINSTEIN, ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY  
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SEN. LEAHY: The Foreign Intelligence Surveillance Act or FISA is intended to protect both our national security and also the privacy and civil liberties of Americans. Changes to that law have to be considered carefully and openly. They can't be eviscerated in secret administration interpretations or compromise through either fear or intimidation. The so-called Protect America Act, passed just before the summer recess, was an example of the worst way possible to amend FISA. It was hurriedly passed under intense, partisan pressure from the administration. It provides sweeping new powers to the government to engage in surveillance without warrants of international calls to and from the United States involving Americans, and it provided no meaningful protection for the privacy and civil liberties of the Americans who are on those calls.

Now, this act will expire next year, and so this is the committee's second hearing to inform our consideration of possible legislation to take the place of that flawed act. Of course we have to accommodate legitimate national security concerns and the need for flexibility in surveillance of overseas targets, but Congress should do that in a way that protects the civil liberties of Americans.

And I commend the House committee and the Senate Select Committee on Intelligence for seeking to incorporate the better ideas from our work this summer into their current legislative proposals. The House of Representatives is considering the RESTORE Act, which appears to take a fair and balanced approach allowing flexibility for the intelligence community while providing oversight and protection for Americans' privacy. The Senate Select Committee on Intelligence has also reported a bill that makes improvements to the current temporary law. Increasing the role of the FISA Court and oversight by the inspector general and the Congress are matters we should have incorporated this summer.

At the outset I should acknowledge the grave concern I have with one aspect of S.2248. It seems to grant immunity or, as Senator Dodd called it, amnesty for telecommunications carriers for their warrantless surveillance activities from 2001 through this summer. Well, those seem to be on the face of them, at least, to be contrary to FISA, in violation of the privacy rights of Americans. Before even considering such a proposal, as we said at the Mukasey hearing -- a matter that will be before our committee, I think, next Tuesday -- Senator Specter and I have always been clear with the administration that we would need the legal justifications, authorizations and other documents that show the basis for the action of the government and the carriers.

And since the existence of the president's secret wiretapping program became public in December 2005, this committee sought that relevant information through oral and written requests and by conducting oversight hearings. After our repeated requests did not yield the information the committee requested, we authorized and issued subpoenas for documents related to the legal justification for the president's program.

And finally, this week, the administration belatedly responded. Senators on the committee and designated staff have begun to receive access to legal opinions and documents concerning authorization and reauthorization of the program. This is a significant step and most long overdue. I insisted all members of the committee have access, Republicans and Democrats alike, and that was agreed to in a meeting yesterday. And I'm considering carefully what we're learning from these materials.

The Congress should be careful not to provide incentive for future unlawful corporate activity by giving the impression that if corporations violate the law and disregard the rights of Americans, they will be given an after-the-fact free pass. If Americans' privacy is to mean anything, and if the rule of law is to be respected, I think that would be a wrong result.

A retroactive grant of immunity or amnesty or preemption of state regulators does more than let the carriers off the hook. Immunity is designed to shield this administration from any accountability for conducting surveillance outside the law, to make it impossible for Americans whose privacy has been violated illegally to seek meaningful redress. The lawsuits that would be dismissed as the result of such a grant of immunity are perhaps the only avenue that exists for an outside review of the government's program, an honest assessment of its legal arguments, especially as the Congress has for years been stonewalled on this program. That kind of assessment is critical if our government is going to be held accountable.

One of my chief inquiries before deciding to support any legislation on this subject is whether it's going to bring about government accountability. Anyone who proposes letting the telecommunications carriers off the hook or preempting state authorities or giving the type of immunity or amnesty has the responsibility to propose a manner to test the legality of the government's program and decide whether it did harm to the rights of Americans. Safeguarding the new powers we are giving to our government is far more than just an academic exercise. The FISA law itself is testament to the fact that unchecked government power leads to abuse. The FISA was enacted in the wake of earlier scandals, when the rights and privacy of Americans

were trampled because nobody was watching. We in the Senate, and this committee, especially, have a solemn responsibility to 300 million of our fellow citizens, because the American people's rights and freedom and privacy can be easily lost; but once lost, they're very difficult to win back.

I look forward to the testimony of our witnesses, and I appreciate them being here. And I'll yield to Senator Specter.

SEN. ARLEN SPECTER (R-PA): Thank you, Mr. Chairman.

I am glad to see that we have come a long way in the last 18 months since legislation was introduced in mid-2006 to bring the Terrorist Surveillance Program under the FISA Court. And we have some very important considerations to protect U.S. persons, to have the FISA Court review the procedures, and to handle minimization in an appropriate way.

With respect to the request for retroactive release of liability, I have great reluctance. Part of that stems from the secrecy that the government has interposed. When we were seeking subpoenas last year for the telephone companies, we were thwarted by action of the vice president in contacting Republican members without notifying the chairman. And as I see the situation, I think that telephone companies do have a strong equitable case, but my inclination is that they ought to get indemnification, that the courts ought not to be closed. I doubt very much that cases will be proved, but if plaintiffs can prove them, I think they ought to have their day in court. And it is costly, but that's part of the cost of the war on terrorism.

Finally, yesterday, we had a closed-door briefing on what is happening, and I believe we need more briefings. The government has been reluctant to follow the statute on informing the Intelligence Committee about FISA until they needed support for the confirmation of General Hayden as director of the CIA. And the session we had yesterday was an important one, and I think we need more information from the administration. The chairman has referred to the pendency of the nomination of Judge Mukasey to be attorney general, and that is a matter which covers the issues which are before us now or a first cousin, at a very minimum. And it is my hope, Mr. Chairman, that we would be able to resolve the issues on Judge Mukasey sooner rather than later, and I know that's your inclination as well and that you had wanted to bring the matter to a determination by the committee early. I think it may be advisable to have a closed-door session where we talk about waterboarding and!

we talk about torture and we talk about those techniques. Earlier this week, in the wake of the issue on waterboarding, I had an extensive briefing by General Hayden. There are people who overlap with the Intelligence Committee, with the Judiciary Committee, who know about the details, and I believe it is a matter that the full committee ought to be informed about.

I think that the extensive letter which Judge Mukasey has submitted goes about as far as he can go. He has repudiated waterboarding, he has rejected it, but he has stopped short of making a determination of legality. And let's face the facts. The facts are that an expression of an opinion by Judge Mukasey prior to becoming attorney general would put a lot of people at risk for what has happened. Now they may be at risk regardless of what Judge Mukasey says or what the next attorney general says.

And last week former Secretary of Defense Rumsfeld was in France, and there was an effort made to initiate a prosecution against him. And extraterritorial jurisdiction is being asserted by many countries under the doctrine of crimes against humanity. Ordinarily a prosecution can be brought only where the act occurred, but what Judge Mukasey would say on that subject has repercussions in that direction.

The standard has been articulated of whether it "shocks the conscience," under the Rochin decision, and that depends upon a totality of circumstances. It depends on who is the individual, what access the individual has to information, how important the threat is, what is the likelihood of getting information which would be critical in saving lives. We all dodge around the so-called ticking bomb case. Nobody wants to articulate a principle if there are any exceptions to torture. And it is probably advisable not to be explicit in that situation, because you may make exceptions which will be broadened, as the expression goes, that you can drive a truck through.

But we do know that the Department of Justice is in dire straits. If there's one thing that this committee and perhaps the entire Senate is unanimous on, it's that the Department of Justice is dysfunctional.

I think we need extensive assurances, but as I will carefully read Judge Mukasey's letter, I don't know how much more he could say than what he has said, considering the exposure to people in collateral circumstances and considering the impossibility of predicting what may be faced with respect to a future potential danger if the so-called ticking bomb hypothetical were to reach fruition.

But what I would like to see is us, Mr. Chairman, go into a closed session like we had yesterday. I thought it was very fruitful when we were behind closed doors and could talk more openly about the subject matter of what the telephone companies have been doing, and to share information from those who know more about the interrogation techniques and the waterboarding than many members of this committee know. And the Intelligence Committee is privy to that, and they should be, but so should this committee when we have to make a measurement and make a decision about the adequacy of what Judge Mukasey has said on a subject which could defeat his confirmation. No doubt the confirmation is at risk at this moment because he has not answered the question categorically.

And I think that we need to have a very frank discussion with more facts available, and I believe that can only be done in a closed-door session. I would hope we might do that early next week. Hopefully we could get Judge Mukasey on the agenda for next week and either fish or cut bait on this important matter.

SEN. LEAHY: As I said, Judge Mukasey will be on the agenda on Tuesday. But I think the -- there are a whole lot of -- and the reason I'm doing it Tuesday and not on Thursday is because -- and of course everybody's rights are protected under -- that there a whole lot of other issues that he responded to late last night, involving, among other things, executive authority, his views on the ability of the executive to override laws passed by Congress, his views on the

executive being able to preempt congressional actions on contempt citations and things like that, that others wanted to consider. So it's not just the waterboarding issue.

Obviously, many of us felt that the United States, which would roundly and universally condemn the waterboarding of an American held by any other country -- many of us had felt that the attorney general nominee should do the same thing. We would put us back, just to think -- without even taking current times, think back to the old Soviet Union days.

The then-Soviet Union had picked up an American, waterboarded that American, you'd have 535 members of Congress, House and Senate, wanted to vote for a resolution condemning, and whoever was present, Democrat or Republican, would have condemned it. I think that is one of the concerns I hear expressed by Americans, but that -- let's not go into debate on that. We will have plenty of time to debate this issue. That's why I'm setting aside special time just for this matter.

We have before us Kenneth Wainstein, who served as the first assistant attorney general for National Security in September 2006. I'm sure he thinks that time has gone by so rapidly. Prior to his appointment, he has held various positions in the Justice Department, including as the United States attorney for the District of Columbia, where we first met. When I say that -- (inaudible) -- not because I or any member of this committee was before him in that capacity. He also served as chief of staff to the director of the FBI, where he also had dealings.

Mr. Wainstein, would you please stand and raise your right hand?

(Senator Leahy gives Mr. Wainstein the oath.)

Of course your full statement will be made part of the record, but please go ahead and --

MR. WAINSTEIN: Thank you, sir.

Chairman Leahy, Ranking Member Specter, members of the committee, I want to thank you all for this opportunity to testify before you on this important matter. I'm proud to be here to represent the Department of Justice and to discuss our views on this very important issue with you.

I'd like to take a few minutes just to discuss three specific points. I'd like to explain first why it is I believe that Congress should permanently legislate the core provisions of Protect America Act; second, how it is that we've gone about implementing the authority in the Protect America Act with significant oversight mechanisms and congressional reporting; and third, I'd like to give you our preliminary views on the thoughtful bipartisan bill that was reported out the Senate Intelligence Committee two weeks ago.

Before I do that, I would like to express our appreciation for the attention that Congress has given to this important issue. Congress has held numerous hearings and briefings on the issue over the past year or so, and that process had produced the Protect America Act, which was a very significant step forward for national security, and in the Senate it culminated in a bipartisan

bill referred to this committee, S.2248, which was voted out on a strong 13 to 2 vote. We applaud Congress for its initiative on this issue and its willingness to consult with us as it moves forward on FISA modernization.

Let me turn to why I believe that the core provisions for the Protect America Act need to be made permanent. The government's surveillance activities are a critical, if not, the most critical part of our investigative efforts against international terrorists and other national security threats. By intercepting these communications, we get an insight into the capabilities, their plans and the extent of their networks.

Before the Protect America Act, however, our surveillance capabilities were significantly impaired by the outdated legal framework in the FISA statute. FISA established a regime of court review for our Foreign Intelligence Surveillance activities, but not for all such activities. The court review process that Congress designed applied primarily to surveillance activities within the United States, where privacy interests are the most pronounced and not to oversee surveillance against foreign intelligence where -- (word inaudible) -- privacy interests are at minimal or nonexistent.

While this construct worked pretty well at first, with the vast changes in telecommunications in the past 29 years, a good number of our surveillances that were originally not intended to fall within FISA became subject to FISA, those that were targeted outside the U.S., which required us to go to court to seek authorization and effectively conferred quasi-constitutional protections on terrorist suspects and other national security threats who are overseas.

Over that same period, we were facing an increasing threat from al Qaeda and other international terrorists, and it was a combination of these two factors, the increasing burden of FISA and the increasing threat, that brought us to the point where we needed to update FISA. In April of this year, we submitted to Congress a comprehensive proposal to modernize FISA. As the summer progressed, Congress recognized the immediate need to address the rising threat and pass the Protect America Act, which clarified that overseas surveillances are not subject to FISA Court review. And within days, we implemented that new authority, and the DNI has announced that we've filled the intelligence gaps that were caused by FISA's outdated provisions.

We've recognized from the very moment that the Protect America act was passed that Congress would authorize this -- reauthorize this authority only if we could demonstrate to you and to the American public that we can and will exercise this authority responsibly and conscientiously. To that end, we imposed oversight procedures upon ourselves that are well beyond those required in the statute, and we committed the congressional reporting that's well beyond that required in the statute. And in the process, we've established a track record of responsible use of the Protect America Act, a track record that provides solid grounds for Congress to permanently reauthorize it.

Against that backdrop, the Senate Intelligence Committee recently voted out S.2248, and we're still reviewing the bill. But we believe that it's a balanced bill that includes many sound provisions. It would allow our intelligence professionals to collect foreign intelligence against

targets located overseas without obtaining prior court approval, and it also provides retroactive immunity to electronic communication service providers who assisted the government in the aftermath of 9/11. We believe this immunity provision is necessary both as a matter of fundamental fairness and as a way of ensuring that providers will continue to provide cooperation to our surveillance efforts. That bill also remedies the possible overbreadth concerns that some had regarding the Protect America Act, and it includes significant oversight and reporting mechanisms.

We do, however, have concerns about certain provisions in the bill, in particular the sunset provision and the provision that would extend the role of the FISA Court for the first time outside our borders by requiring a court order when we surveil a U.S. person who's acting as an agent of a foreign power outside the U.S. However, we look forward to working with this committee and Congress to address those concerns and to achieve -- or to seize this historic opportunity to achieve lasting modernization of FISA that will improve our ability to protect both our country and our civil liberties.

Thank you for the opportunity to testify, and I look forward to answering your questions.

SEN. LEAHY: Well, thank you for your statement. And I -- when you deal with something like this, it's very difficult to be sure what parts we're dealing in open session -- but the Senate Intelligence Committee in their report on their legislation said that the government provided letters to the electronic communication providers at regular intervals between late 2001 and early 2007 to justify the existence in this program of warrantless wiretapping. All these letters stated the activity has been authorized by the president. All but one -- all but one -- say the activities have been deemed lawful by the attorney general.

So is it the position now of the government that these letters were certifications that made it legal for the companies to assist the government?

MR. WAINSTEIN: Those letters were the assurances that were provided to the companies that this was a program directed or authorized by the president and that they were legal.

And if you look at the criteria in the retroactive immunity provision in the Senate bill, in the Senate intelligence bill, those criteria are satisfied.

SEN. LEAHY: If they said that this would make it illegal, why is it necessary to provide immunity? Wouldn't it be just better maintain faith in government to let our judicial system make that determination? I mean, the government has already told the carriers that this was legal. Why do we need to do it further? Shouldn't the courts be allowed now to say whether the government was right in saying that?

MR. WAINSTEIN: Well, I understand the sentiment that, you know, we should be allowed to go -- people who feel like they're aggrieved should be allowed to go into court. And as a standard matter, that makes sense. The problem here is that sort of -- as I alluded to earlier, there's a basic fundamental matter of fairness that the government at the highest levels, in the aftermath of the worst attack upon the United States, at least since Pearl Harbor, went to these

providers, who are the only ones who can provide the assistance for critical communications intelligence work -- went to them, said, "We need this work. It's lawful. It's been deemed lawful at the highest levels of the American government, and we need that assistance."

SEN. LEAHY: But I accept that. So why not just -- why shouldn't that be enough? Why do you have to pass further legislation? If you feel secure in what you did, why ask for further legislation? Why not let the courts just deal with the certification made by the president that this was legal?

MR. WAINSTEIN: Well, we feel that it's --

SEN. LEAHY: Unless you're not comfortable with having made that certification.

MR. WAINSTEIN: No, and I don't believe the concern is airing out what the government did or didn't do. The concern is airing out what the companies did and putting them through the cost, the litigation, the exposure, the difficulty of litigation when they were really just doing something to protect the country. If there are to be lawsuits, they should be against the government. The problem with any lawsuits, you know, against the companies is that it's unavoidable that very sensitive classified information is going to be released, and we've seen this already in this (litigation ?). SEN. LEAHY: Well, if you make a blanket assertion of state secret, then you do have difficulty. But if you're just going to use the specific classified information needed, that's done by courts all the time, that classified information is looked at in camera. Why couldn't that be done here?

MR. WAINSTEIN: That's right, but you know, in my experience, the classified information that's subject to --

SEN. LEAHY: I mean, you had that as U.S. attorney.

MR. WAINSTEIN: Yes, yes. In that, there is a standard. There's CIPA, the statute that allows the government to use classified information or bring a prosecution that implicates classified information and insulate it from unwarranted disclosure. The problem is that the whole cause of action here, the whole sort of mode of conduct being challenged, is a highly classified program.

And our adversaries aren't -- you know, they're not ignorant. They know that this is going on, and they know to watch what's happening in the news because they want to get tips as to how it is that we're trying to surveil them. And the adversaries aren't just terrorists, you know, in caves. They're also potentially foreign services that are pretty sophisticated. So every little nugget of information that comes out in the course of these litigations helps our enemies. In addition, I would say, you know, you've got to also keep in mind --

SEN. LEAHY: Well, sir, should we be prosecuting -- if that's the case, be prosecuting The New York Times and others for having printed all this? I mean, they gave the information -- actually, Congress found out about the things that were supposed to have been reported to Congress, never was; we read it on the front page of The New York Times.



MR. WAINSTEIN: Yes. No, I'm not advocating prosecutions --

SEN. LEAHY: I didn't think so.

MR. WAINSTEIN: -- (chuckles) -- in that realm. What I'm saying, though, is that there are serious concerns on the part --

SEN. LEAHY: In my experience, I've only had one government official recommend that the -- or say they wanted to investigate The New York Times and prosecute them, and that person is no longer alive.

Go ahead.

MR. WAINSTEIN: Okay. Also, I'd direct your attention to the fact that these providers -- I can't go into exactly which providers they were, but you could imagine that these are companies that might well have personnel and facilities around the world. And they've got a very serious concern that if they get identified, intentionally or unintentionally, through litigation, those facilities, those personnel might well be subject to risk, because they've been identified as assisting us in our efforts against terrorists.

SEN. LEAHY: But for those who think that there should be some accountability on the part of our government -- and obviously the government did not want to have that accountability. They did not go to the people in even the Congress, so there may be a check and balance, acted totally outside of any kind of accountability until somebody within your administration leaked all this to the press. Isn't there some way -- how do you find a way to assess the legality and appropriateness of this warrantless wiretapping program? I mean, if you say we can't have cases, that we can't have court cases, we've got to have immunization, how do you assess this?

MR. WAINSTEIN: Well, I think that if there are to be lawsuits -- I mean, the concern people have here is with the legality of the program, and that legality determination was made by the government. So if people have a concern about it, it should be -- any litigation should be directed at the government.

SEN. LEAHY: Okay, but then you have a Catch-22. The government says, "Ah! State secrets."

MR. WAINSTEIN: Right. Which we would say in the context of litigation against the carriers as well, which is --

SEN. LEAHY: But you're going to say it against the government. So there really is no way of finding the government accountable. If we give blanket amnesty to the companies, then you're not going to be able to sue the government. They're going to be able to provide their own amnesty by saying, "state secrets."

MR. WAINSTEIN: And we're in that position right now. No matter whether the litigation is directed at the companies or at the government, state secrets can be interposed. Keep in mind there are --

SEN. LEAHY: Why? Why can't they just go to classified information, take it in camera?

MR. WAINSTEIN: Well, we have to demonstrate that -- I mean, we have to go and demonstrate that state secrets are going to be implicated here, that the litigation can't go forward without divulging state secrets, and we invoke the doctrine.

But keep in mind, if I may, Mr. Chairman, there are many investigations going on right now about the propriety of what was done or not done under the Terrorist Surveillance Program. So in terms of accountability, if there's wrongdoing, that wrongdoing's being ferreted out in ways, very traditional ways, other than litigation.

SEN. LEAHY: I'm not sure of that, because it seems that you're putting up brick walls everywhere somebody might look at.

Let me ask you one and then my final question. The House is considering the RESTORE Act. They have a provision calling for the Department of Justice inspector general to audit all government surveillance programs that occurred outside of FISA in the years following 9/11. Now, they want it audited even if we were to grant retroactive immunity to the telephone companies. Do you object to Congress providing for such an audit in a bill that might go to the president?

MR. WAINSTEIN: As I recall, the RESTORE Act provides or directs the Department of Justice inspector general to do oversight, ironically sort of oversight of intelligence community agencies. And we did have some concern about that, just because that's a little bit outside DODIG's lane. Very strong inspector general, I grant you, but outside his lane. So we had some concerns about that.

We also thought that injecting the whole Terrorist Surveillance Program issue into this was unfortunate. Because this is an effort -- this being this legislation -- is an effort to get Congress and the executive branch on the same page so that the constitutional issue of what can or can't be done under executive authority is not there -- constitutionally there's no pressure on that issue. So we think it's a better approach to say, okay, let's leave that aside in terms of, you know, whether the TSP was within the constitutional authority of the president or not, legal or not, and just focus on how we're going to fix FISA for the American people.

SEN. LEAHY: Maybe the difficulty is, it seems so unprecedented for the administration to say they actually want to be on the same page with Congress -- this administration anyway.

Senator Specter.

SEN. SPECTER: Mr. Wainstein, let's begin by discussing the relative role of the courts in protecting civil liberties, and what it would mean to grant retroactive release of liability. In the

long history of this country, the courts have done a much better job in protecting civil liberties than has the Congress from an overreaching executive branch. And we have seen, in this administration, extension of executive authority.

Now, in many ways, it is necessary to protect America. And when the administration came to the Congress and asked for a Patriot Act, this committee took the lead in providing a Patriot Act with expanded executive authority for investigations to fight terrorism.

We at the same time imposed some limitations on oversight, negotiated with the administration, and then we found a signing statement which reserved the president's rights under Article II, commander in chief, not to pay attention to the negotiated limitations.

And if we are to close the courthouse door to some 40 litigants who are now claiming that their privacy has been invaded, it seems to me we are undercutting a major avenue of redress. If at this late date the Congress bails out whatever was done before and we can't even discuss what has been done, that is just an open invitation for this kind of conduct in the future.

Why not provide for indemnification? I believe the telephone companies have a very strong equitable case in saying that they were good citizens in responding to what the government ordered or requested and that the telephone companies shouldn't have to weigh the importance to national security. But isn't the cost of those lawsuits part of our overall battle against terrorism and isn't it an infinitesimal cost, and isn't likely that these lawsuits are not going to be successful?

You find the federal government interposing the doctrine of state secrets very broadly, trying to stop reviews under the Terrorist Surveillance Program or in the San Francisco federal court or stopping litigants who have claimed torture on rendition can't go to court, can't have a hearing because of the state's secret doctrine.

So it's a two-part question. Number one, why not make it a matter of indemnification, and isn't such indemnification really likely to cost the government very little, if anything, because these suits are destined for failure?

MR. WAINSTEIN: I guess I would go back, Senator Specter. I'd go back to sort of the foundational issue for me, which is these were companies operating on good faith, on assurances from the government. If there is fault here, it's fault in the legal analysis and the decisions made by the government.

SEN. SPECTER: I concede they're operating in good faith.

And if they're indemnified, they're not going to be harmed. They're going to be held harmless. So why not do that?

MR. WAINSTEIN: True, I think you're right that maybe as a legal matter, in terms of damages, they might be held harmless. But indemnification just means that we would pay the bills at the end of the process, but they would have to go through the process. And keep in mind,

there is a lot of damage inflicted on these companies from having to go through the litigation, be subject to discovery --

SEN. SPECTER: Well, what do they have to go through when you impose the state secrets document (sic)? I can't even question you in a Judiciary Committee hearing about what is going on, because it's a secret. And every time you impose the state -- virtually every time you impose the state secrets document, you win. Those witnesses don't even have to appear. They're not going to be deposed. There's no discovery. They're cut off at the pass. Aren't they really?

MR. WAINSTEIN: Well, there's no assurance that we're going to prevail every time we interpose with the state secrets doctrine. And the litigation still has to get to that point. And keep in mind that, you know, we're also dealing with an industry that has -- really has the access to the communications that we absolutely need. And it's critical that we maintain cooperation with these companies. If they find that they are constantly and being pulled into court for assistance with the government --

SEN. SPECTER: Have you suggested to them that you would grant them indemnification? When I've talked to the telephone companies that have commented about that, they seemed to think that that would answer the question. Have you asked them?

MR. WAINSTEIN: I know there have been discussions about various options -- indemnification, substitution. But anything that -- also, keep in mind, anything that keeps the litigation going also compromises secret information about sources and methods that we have a very serious concern about. Even if we don't prevail with state secrets, then there is no guarantee that information is not going to get out. In fact, even just the filing of lawsuits and the allegations made can actually end up -- allegations made in the initial pleadings can end up compromising sensitive sources and methods --

SEN. SPECTER: Oh, really? Allegations in a lawsuit for people who are plaintiffs who don't have any inside information? MR. WAINSTEIN: Yes.

SEN. SPECTER: If they know something, it must be in the public domain.

Let me move to one other line of question, and that is to protect U.S. persons. Admiral McConnell testified that there were 46 persons abroad, U.S. persons, under surveillance abroad. Why not require a showing of probable cause? And also, on U.S. persons who are the recipients of calls from overseas -- if you have a call from overseas to another overseas point going through a U.S. terminal, I can readily agree with your point that that is not an involvement of a U.S. person. But where a U.S. person is targeted abroad or when it is determined that a U.S. person is being under surveillance from a foreign call, why not require a statement of probable cause and approval of a warrant by the Foreign Intelligence Surveillance Court?

MR. WAINSTEIN: Yes, sir, good questions, two separate questions.

In terms of the question of whether we should have to go to the FISA Court to make a probable cause showing before we surveil a U.S. person outside the United States, that arose in the context of an amendment that was attached to the Senate Intelligence bill that came out --

SEN. SPECTER: The Wyden Amendment.

MR. WAINSTEIN: Right, the Wyden Amendment.

And that has been an area of much debate back and forth. As you know, under traditional procedure since 1981, FISA did not require that we get a -- in the statute itself from 1978 -- did not require that we get a court order for a U.S. person overseas because of that person's U.S. person status. Instead, what we had is an executive order that was passed in 1981 that required that every time the government wants to surveil a U.S. person overseas, the attorney general himself or herself personally has to make a finding of probable cause that that U.S. person is an agent of a foreign power.

That was challenged at least once in court and has been upheld as reasonable under the Fourth Amendment. It's worked quite well. We have minimization procedures that limit the dissemination, use and retention of U.S. person information that we get from those surveillances. And our argument is, that mechanism has protected American civil liberties quite well.

There are downsides to imposing that as well, operational downsides. And for one, you're taking the FISA Court and, for the very first time, putting the FISA Court into surveillances targeted outside the United States. The statute itself will be saying, person who's outside the U.S., you still have to go to the FISA Court, which is a new extension of FISA Court jurisdiction. Operationally it would also, you know, potentially bring the FISA Court into the realm of having to deal with foreign laws, for instance, laws that might be in effect in the foreign countries where we want to do the surveillance.

So there are some complicated operational matters, some which I think are better left to be discussed in classified setting, that I think are implicated by requiring that all overseas surveillances against U.S. persons have to go to the FISA Court. SEN. SPECTER: Thank you, Mr. Wainstein.

Thank you, Mr. Chairman.

SEN. LEAHY: Thank you, Senator Specter.

Senator Feinstein.

SEN. DIANNE FEINSTEIN (D-CA): Thank you very much, Mr. Chairman.

Mr. Wainstein, welcome.

MR. WAINSTEIN: Good morning.

SEN. FEINSTEIN: I think there are two big issues in this bill. One is the immunity provision. The other, in my view, is the exclusivity provision of the bill.

Senators Snowe, Hagel and I filed some additional views, which I'd like to urge you to read. And what we stated is our very strong belief that we believe FISA should be the only legal way of acquiring communications of people inside the United States and U.S. persons outside of the United States in certain circumstances for foreign intelligence purposes. And we go ahead and elaborate on it.

Now, the language in this bill was an Intelligence Committee compromise in the sense it was the best certainly I could do at the time. I am not at all satisfied with it because it is not comprehensive, and it does provide some loopholes. And I think those loopholes, candidly, are unacceptable. It is my belief that the administration exceeded its authority in moving ahead with the Terrorist Surveillance program. And it is also my belief that we have ample history going back that this has happened before in the same way that led to the foundation of the bill before us, and of course that was the Shamrock case in the 1970s. Somehow we don't learn from our mistakes.

I am very concerned about the use of presidential authority in this area. The president has claimed the AUMF. I'm here to say that when the AUMF was passed there was no congressional intent that it be used for this purpose. That was not discussed. I was present at many of the meetings. There was no discussion on allowing the AUMF to be allowed for presidential authority in this area, and I believe the initial part of the Terrorist Surveillance Program was in fact illegal. So I want to strengthen the exclusivity provisions to prevent any loopholes and to see that it is clear for the future. That's the first point.

The second point is on the subject of immunity, and this is where it becomes extraordinarily difficult for me with my belief that the administration proceeded illegally. Nonetheless, I've read the letters sent to the companies. I'm aware of the fact that assurances were made to the companies by the executive branch of government. Those assurances may well have been wrong, but nonetheless these were the assurances that the companies were given. This happened three weeks after 9/11. I understand the tenor within the country.

The letter sent to us dated October 29th and signed by Attorney General Ashcroft, James Comey, Jack Goldsmith and Patrick Philbin makes this comment. When -- and I'm quoting -- "When corporations are asked to assist the intelligence community based on a program authorized by the president himself and based on assurances that the program has been determined to be lawful at the highest levels of the executive branch, they should be able to rely on those representations and accept the determinations of the government as to their legality -- as to the legality of their actions." I happen to agree with that. And that goes on to say, "The common law has long recognized immunity for private citizens who respond to a call for assistance from a public officer in the course of his duty." But the question arises as to whether the situation can't be better handled because FISA has both a criminal and a civil prohibition in it, and therefore, I wonder how the administration w!

ould feel about the capping of damages at a low level. And the problem with indemnification is we score this bill at 20 (billion dollars), \$30 billion, and that becomes a problem, I think, when

you say the taxpayers should pick this up. This isn't a mistake made by the taxpayers; it's a mistake, I believe, made by the administration.

So the question comes, what sense does it make to proceed with an indemnification and a cap at a low level?

MR. WAINSTEIN: Thank you, Senator Feinstein. I'll take those in reverse order.

I sort of answered that question to some extent with, I believe, Senator Specter in terms of whether indemnification addresses all our concerns. Obviously, if there is a cap, then it does address the concern that the taxpayer might get hit with high damages, but all those other concerns we'll still obtain. We'll still go through litigation to the extent that state secrets doesn't short circuit it. There's still the risk that classified sensitive information will be disclosed. The providers themselves will go through potential reputational damage; they'll go through the difficulty of litigation, depositions, discovery and the like -- all for having done something, which, as you said, was based on the assurances and the highest levels of the government of the legality of that program and did so out of the patriotic sense that they wanted to help protect the country against a second wave of attacks after 9/11. So all those other issues, I think, are still there, even if you do cap the damages.

As to your first question about the Terrorist Surveillance Program and the --

SEN. FEINSTEIN: Exclusivity.

MR. WAINSTEIN: -- the question of the exclusivity clause, I know there is an exclusivity clause that's in the Senate intelligence bill. I think it makes the point quite clearly.

As I said earlier, I believe that the nice thing about that legislation and this process is that we seem to be moving toward a point where we are all on the same page, that there is not going to be any need for the executive branch to go beyond what FISA has required. And --

SEN. FEINSTEIN: That's not what this language does. It's specifically crafted in order to get it in that would allow a loophole or more than one loophole.

MR. WAINSTEIN: Well, it says that it is the exclusive means. The president, if he signs this legislation, is agreeing to that. We have operated in accordance with that since January of this year. As you know, we went to the FISA Court; we took the Terrorist Surveillance Program and brought it under FISA Court orders on January 10th or 17th of this year. So the Terrorist Surveillance Program is no more. It is under FISA Court order, and I think that's an important thing for us to have done prior to the time that we came in about this legislation because it shows that we are operating within FISA, even within the constraints of old FISA. And I believe that you'll then see that if we have a scheme which is much more -- which we can use much more easily to protect the nation, there's going to be even less need for this president or future presidents to go outside of FISA. And keep in mind, you know, nobody can bind future presidents as to what their constituti-

onal duty is one way or the other -- (inaudible).

SEN. FEINSTEIN: My time is up, and I want to be respectful of the time.

I disagree with you about the exclusivity. I think this is a subject for a classified session, and I think that the administration should be very candid with us as to what is in exclusivity and what is out of exclusivity. And I'll leave it at that.

MR. WAINSTEIN: If I may, Senator Feinstein, I appreciate that, and we would be very happy to talk to you in a classified setting because there are some operational concerns that we only could air out in a classified setting about certain exclusivity clauses that have been proposed.

SEN. FEINSTEIN: All right, thank you. Thank you, Mr. Chairman.

MR. WAINSTEIN: Thank you.

SEN. LEAHY: Thank you.

Normally, it would be Senator Hatch, but he's not here.

Senator Kyl.

SEN. JON KYL (R-AZ): Thank you, Mr. Chairman.

I just want to start -- there was a comment made earlier about the Department of Justice being dysfunctional, and I would dispute that. It is true, I think, that it's in desperate need of leadership, which of course could be cured if the attorney general nominee were confirmed.

But I think there are a lot of good men and women at the department who are doing their job under difficult circumstances, and we should recognize that.

My first question, Mr. Wainstein, concerns the legal authority for the foreign surveillance program, and it is whether you know of any case. And the only case of which I am aware that has spoken to the issue -- and it's dicta, it's not a holding, but the case has never been squarely presented as far as I know -- is a FISA case in 2002 titled *In Re Sealed Cases*. And this is the pronouncement of the court on that circumstance, in that circumstance.

Quote, "The Fourth Circuit, in the *Truong* case, as did all the other courts to have decided the issue, held that the president did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. We take for granted that the president does have that authority. And assuming that is so, FISA could not encroach on the president's constitutional power."

Now, are you aware of that case?



MR. WAINSTEIN: Yes, sir.

SEN. KYL: Did I characterize it accurately in your view?

MR. WAINSTEIN: Yes, Senator, that's my understanding --

SEN. KYL: Do you know of any other case in which a court has spoken to this question which goes, of course, to Senator Feinstein's point about exclusivity?

MR. WAINSTEIN: No, actually as you quoted from that case, the courts who have addressed this issue have determined that the president does have that authority, and they've been consistent in that.

SEN. KYL: Now, furthermore, in your testimony on page 4, you talk about the historic surveillance that we have conducted and the history of FISA establishing a judicial review regime, but not for all of our foreign surveillance. You say only for certain of those that most substantially implicated the privacy interest of the people of the United States, which I think is accurate. And you point out that it was not intended to apply to all overseas surveillance. And you went on to note that the House report at the time, the House Permanent Select Committee on Intelligence report, 1978 -- I would add that that was under Democratic control -- confirmed that this was the case, and quoting that report, which explained that the committee has explored the feasibility of broadening this legislation to apply overseas but has concluded that certain problems, unique characteristics involved in overseas surveillance preclude the simple extension of this bill to overseas sur-

veillances, making the point that we have had, for decades, overseas surveillance which has not required going through any court to obtain a warrant. Is that correct?

MR. WAINSTEIN: Yes, under the wording of the statute and of course, the problem is that -- and what we're trying to remedy here is the problem that has taken us away from the original design of FISA, which is as you've just described it. And that is, as I think we also explain in the statement, a function of the evolution of the technology since 1978. And the fact is, the original FISA was designed -- it was actually -- the terminology -- the statute was based on the types of technology that were going to be intercepted -- wire or radio.

And that has changed dramatically, bringing in all these communications within FISA that weren't intended to be within FISA to begin with, primarily the ones outside the United States.

SEN. KYL: Exactly. Now there's also been some language thrown -- and I think we should be a little careful of throwing around words like "amnesty." Amnesty obviously refers to a situation in which a crime was committed, and that crime is going to be forgiven. Is that your understanding of the word "amnesty"?

MR. WAINSTEIN: More or less.

SEN. KYL: Do you know any allegation that -- or at least any fair allegation -- that any of these telecom companies committed a crime for which they might need some kind of amnesty?

MR. WAINSTEIN: No, Senator Kyl. Quite the opposite. My sense is they were operating out of a sense of patriotic duty.

SEN. KYL: Well, that's my sense too. And I wanted to quote something from Judge Cardozo, because I think it applies here. In a case called Babington versus Yellow Taxi Company, he said, and I quote, "The rule that private citizens acting in good faith to assist law enforcement are immune from suit ensures that" -- and this is in the case, the words of Justice Cardozo -- quote, "the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely, and with whatever implements and facilities are convenient and at hand."

Now it seems to me that that captures the obligation and responsibility that we expect of citizens who are in a unique position to assist our government in a situation like this, and that we should be bending over backward to ensure that they are protected in that assistance for the national good.

The differences between the suggestion of indemnification and providing immunity, it seemed to me, are worth exploring. And some of my colleagues have raised some of those questions with you.

You have indicated that there are a variety of reasons why it would still be difficult, if there is indemnification, to protect American secrets and to protect the companies from all of the exigencies of litigation that would occur prior to the time that the suit were brought to conclusion. If the state secrets doctrine were not successful, would these suits necessarily be brought to conclusion any time before a final judgment, for which then the government might be responsible?

MR. WAINSTEIN: They would go forward after the state secrets doctrine was -- is that -- it would --

SEN. KYL: So if that defense is not successful, they go through the case, they have to come testify, they have to bear the expenses and all, they may be indemnified. But in addition to the possibility that secrets would be revealed, there would be all of the difficulty of going through this litigation, notwithstanding the fact that at the end of the day, they would be reimbursed for their trouble.

MR. WAINSTEIN: Absolutely. And I think not only is it unfair to them and would they suffer reputational damage and costs and expense and have to overcome the difficulties of litigation, but also, you know, as I said earlier, we work on a cooperative basis with these companies, and we can't do it -- we cannot do communications intelligence without them.

I mean, unless we nationalize the communications industry, we have to go through them. And we have to rely on their cooperation.

And to sort of go back to what you quoted from Justice Cardozo, I mean, just like police officer on the street -- I'm trying to think of an analogy -- if a police officer -- if a cab driver drives by a bank and a police officer comes running out, bells are going off, alarms are going -- he says, "Go after that speeding car!" and jumps in the front seat, we don't want the cab driver to sit there and say, "Well, let's think through all the different possibilities. Maybe you're not really a police officer. Maybe that's not the bank robber. You know, maybe you're actually in a fight with somebody out of a bar next door to that bank" -- all these other things.

You want a person or a company who sees, perceives apparent authority on the part of law enforcement to act. And if these companies are subject to liability, they're going to have a disincentive to act in the future, and they're going to challenge any requests that we make to them, litigate them to the nth degree, because they think that that's the way to protect the United States shareholders. We don't want to be in that situation because that will really detrimentally impact our operations.

SEN. KYL: Let me just ask one final question regarding the so-called Wyden amendment. It is not limited to citizens, is it? In other words, it appears to cover -- and I'm quoting now -- "U.S. persons," which would also include U.S. green card holders, which therefore could mean any number of people who live abroad but have a U.S. green card. Is that correct?

MR. WAINSTEIN: Yes, sir.

SEN. LEAHY: The -- I just want to make sure I fully understand. Whether we call it amnesty, immunity or indemnification, prior to this being made public in the press, apparently from somebody within the administration, there was only this presidential directive. After it was made public, the administration then went to the FISA Court. Is that correct?

MR. WAINSTEIN: Mr. Chairman, we went to the FISA Court -- well, we obtained FISA Court authority for the TSP, the surveillances that were done under TSP, in January this year.

SEN. LEAHY: Okay. MR. WAINSTEIN: That was after a long process.

SEN. LEAHY: After it became public. And there's no question in your mind -- if a telephone company has a court order, that clears them; they're totally -- there's no liability on the part of a telephone company response or anybody that responds -- the bank responds to a court order to give over bank records, the telephone company responds to a court order to give telephone records. They -- no suits can go against them, because they responded to that court order. Is that correct?

MR. WAINSTEIN: Yes, sir. That's a defense. And if I could just clarify one thing, I believe that we've said publicly that we actually engage with -- there's a process leading to the FISA Court orders prior to the public disclosure of the program. I believe that we've said that. I just want to clarify that as to when we went to the FISA Court. I wasn't there at the time.

SEN. KYL: I'm -- I actually have the chronology in mind, but that -- I heard that in a classified session, so I'm being careful not to --

MR. WAINSTEIN: Thank you.

SEN. LEAHY: Go on to the senator -- Senator Feingold, who is one of our crossover members from Judiciary and Intelligence.

SEN. RUSS FEINGOLD (D-WI): Thank you, Mr. Chairman.

First, Mr. Chairman, the role of this committee, as you well know, is so important on this issue. And I'm so glad you're having this hearing. I am a member of the Intelligence Committee as well as the Judiciary Committee. I've been following this issue for almost two years, since the day it was revealed in The New York Times, and shortly thereafter I became a member of the Intelligence Committee.

After a bit of a struggle, I had the opportunity to be read into the program; my staff has been read into the program. And I just want this committee to know my view, that the product of the Intelligence Committee doesn't do the job. There can be as much bipartisanship and collegiality as you can possibly have, but the bill still I don't think is adequate, and I think the mere fact that it's bipartisan obviously doesn't make it constitutional.

This process reminds me of what happened with the Patriot Act and the subsequent renewal of the Patriot Act, where we had to rush to judgment in the beginning, somewhat understandable given the time frame, but then, in my view, we failed to correct the Patriot Act in significant areas, and three federal courts have struck down important provisions of the Patriot Act.

Mr. Chairman, we're heading in the same direction here if this committee does not do its job and fix the errors that were made in the Intelligence Committee.

Having said that, I want to get back into this issue of executive power, and I know Senator Feinstein and Senator Kyl have talked about it.

Mr. Wainstein, right now does the president have the authority to authorize surveillance beyond what is permitted by FISA as amended by the Protect America Act?

MR. WAINSTEIN: Senator Feingold, that's obviously a question of constitutional implications. What is the constitutional allocation of authority to the executive branch to defend and protect the country against external threats, and the argument, I think, was laid out in the white paper that was issued by the Department of Justice back in the aftermath, the disclosure of the TSP, that the president did have certain inherent constitutional authority to conduct electronic surveillance or communications surveillance to protect the nation.

As I said earlier, though, I think that this legislation obviates the need to actually engage in that issue.

SEN. FEINGOLD: Well, I know that's the exchange you had with Senator Feinstein, so let me just put on the record. If the bill passed by the Intelligence Committee became law, would

the president have authority to authorize surveillance beyond what would be permitted by that bill? MR. WAINSTEIN: Once again, Senator Feingold, it's not for me to say -- to either stake a claim to or to give up constitutional authority of the president. It's not even this president --

SEN. FEINGOLD: What's your view?

MR. WAINSTEIN: I'd have to actually go back and take a good hard look at all the constitutional underpinnings of that issue, but I've read the positions on both sides; you know, there are good arguments both ways. But there's clearly authority in the executive branch to do warrantless surveillance, and as Senator Kyl has said, the courts that have addressed this issue have uniformly found that the president has that authority, including the 2002 opinion of the FISA Court of Review.

So I think the law is to date is pretty clear on that issue.

SEN. FEINGOLD: I take the opposite view. I think it's clear under Justice Jackson's attest with regard to when Congress has spoken, that the opposite conclusion is warranted, but I think we're going to have to get a new president in order to have a different view that is not so expansive and, I think, dangerous with regard to executive power.

In the Intelligence Committee bill, the government is required to inform the FISA Court about its minimization procedures. First, the government's minimization procedures are provided to the court for approval after they've gone into effect, and second, the government has to provide the court with its own assessment of its compliance with those procedures.

But under the bill, what can the court do, Mr. Wainstein, if it believes the government is not complying with its minimization procedures, which the administration argues are such great protection for U.S. persons?

MR. WAINSTEIN: Well, Senator Feingold, you're focusing on the question of whether -- of what it is we have to do with our minimization procedures vis-a-vis the FISA Court. They -- the FISA Court under this bill will review the minimization procedures, make sure they're reasonable, make sure they satisfy the statutory requirements for minimization procedures. It does not have them conducting ongoing compliance reviews of those minimization procedures.

And I think there are reasons for that. In the original FISA context, they do.

So you know, we have to get individual orders when we get FISAs, under the original FISA, for people in the United States. And there are minimization procedures that apply to that particular surveillance, and the FISA Court does review compliance. We provide --

SEN. FEINGOLD: This reminds me almost of a right without a remedy. The court gets to review it, but has no power to do anything about it. Is that what you're saying?

MR. WAINSTEIN: Well, the problem here is that as you know, this bill allows for programmatic sort of surveillances by category. And this would be a much more comprehensive

compliance review by the FISA Court, making them much more operational than they ever have been in the past.

SEN. FEINGOLD: Well, again, this involves a court that would have the opportunity to review these minimization procedures, and I hope my colleagues are hearing this, with no ability to do anything about it, no ability to say, to the administration, you screwed up and you've got to change this. This is in this intelligence bill that's being labeled as an adequate control over the executive.

Yeah.

MR. WAINSTEIN: If I may, Senator Feingold, just -- and I see your point there. I think it is worth mentioning however that there are any number of oversight mechanisms in this bill, and we're not opposing these. We're not opposing -- we've got a couple operational concerns with one or two, just in terms of the feasibility. But by and large, we're not.

And in fact, if you look, and I mentioned this earlier. If you look at the way we've conducted operations under the Protect America Act, we have, as I said, imposed a lot of oversight on ourselves, tried to be as completely transparent as we can with Congress so that Congress, if it sees a flaw, can do something about it. And we're continuing that approach here because we understand that that's the only way we can --

SEN. FEINGOLD: Appreciate the answer. Hope my colleagues heard it. They have imposed these rules on themselves. We do not have internal rules. We do not have the court having the ability to deal with these problems.

In September, I asked DNI McConnell whether the bulk collection of all communications originating overseas, including communications with people in the U.S., is authorized by the PAA. He responded, quote, "It would be authorized if it were physically possible to do it," unquote. Would this same wide-sweeping type of bulk collection of all communications originating overseas, including those with people in the U.S., be prohibited in any way by the Senate Intelligence Committee bill?

MR. WAINSTEIN: Well, if you're referring to the idea that we would just have a vacuum cleaner and soak up all overseas communications, one problem there of course is that we can only do this if there's a foreign intelligence purpose to it, and we're getting foreign intelligence information. And presumably a vacuum cleaner approach like that would not be selecting only those communications that have --

SEN. FEINGOLD: Would you have any objection to making it clear that this type of extremely broad bulk collection is not authorized by the bill? Would you be willing to support language to that effect?

MR. WAINSTEIN: We'd have to take a look at the language, obviously, to make sure it doesn't have unintended consequences, limiting us in ways that we don't intend. But we'd be happy to take a look at it.

SEN. FEINGOLD: My time's up, but I do hope you'll consider that. Thank you.

MR. WAINSTEIN: Thank you, sir.

SEN. LEAHY: Senator Sessions.

SEN. JEFF SESSIONS (R-AL): Mr. Wainstein, and I would just say to Senator Feingold, you have been direct and honest about your approach to it. The matter was considered in the Intelligence Committee. But by a 13-2 vote, they concluded otherwise.

Congress does have oversight responsibility. It is our responsibility to ask about these programs.

We have the ability, which we have done, to have the top officials that run these programs testify before us and explain them in great detail, ask questions. And we've had the opportunity to cut off funding or prohibit these programs from going forward.

I would say, when we passed the Patriot -- the Protect America Act to extend this program, what this Congress did was, it heard the complaints. It had a in-depth review of what the administration was doing. We found the critical need for the program. We studied the constitutional objections that had been raised, and we concluded that it was legitimate. And we affirmed it, and we approved it. Isn't that fundamentally what's happened, Mr. Wainstein?

MR. WAINSTEIN: As far as I can tell, yes, sir.

SEN. SESSIONS: All right. So we have approved this program, and we approved it because it was the right thing.

I just had a visit to the National Security Agency a week -- last week, and went into some detail, and I came away even more convinced than from the previous briefings I'd had just how critical this program is for our national security.

Mr. Wainstein, do you -- based on your observation and research, do you consider this to be a critical program for our national security? And do you believe that we absolutely, for the security of the American people, need to continue it or something like it?

MR. WAINSTEIN: Absolutely, Senator Sessions. The -- when we talk about the program, the interception of signals or communications intelligence -- it's absolutely critical. And that is how we learn what our adversaries are planning to do. We capture their communications. We capture their conversations. And while we'd be happy to talk to you in classified setting about actual case studies or case anecdotes to explain how we've gotten critical information with the Protect America Act, I can't talk about it here publicly. But it is an absolutely critical piece of our operations.

And yeah, if you talk to the NSA, and you see how quickly we were able to implement the Protect America Act authority, they will tell you how quickly those gaps that the DNI was talking about, prior to August 5th -- how those gaps closed, just like that.

SEN. SESSIONS: In fact, that's exactly what I heard last week. And I have to emphasize to my colleagues, if you talk to the people at NSA, you know they are very careful about what they do. They are -- they self-restrict themselves. They know that people can complain if they overreach. They are not overreaching, I don't believe. And I'm proud of what they are doing. And it's saving lives, not just in the United States, but it is saving lives of those men and women in our military service that we have committed to harm's way, who are at risk this very moment in places like Iraq and Afghanistan and other places. And it's helping preserve their safety and their lives. And it's constitutional, and we've already said that. So I think we should continue with this program.

I'd -- the -- so now we're reduced, I think, to an argument over whether we ought to allow people to sue the telephone or the communications companies that have cooperated at the request of the government to protect this country after 9/11.

And I don't think it's a right phrase, I think, as our chairman said, to say we're "letting them off the hook." They shouldn't be on the hook. They did what their country asked them to do. They were told in writing that it was legal, were they not, what they were doing?

MR. WAINSTEIN: Sir, they were given assurances that -- the same assurances that --

SEN. SESSIONS: And I just don't think that they ought to be hauled into court. And the people filing this lawsuit use it as a vehicle to discover everything they can discover about some of the most top secret programs this country has. And that does happen in these cases, does it not?

MR. WAINSTEIN: Absolutely. This is the most confidential and classified sensitive information that we have in our national security apparatus. And those are the details that get disclosed during that litigation.

SEN. SESSIONS: And I think one of our colleagues earlier said, "Well, this may be the only way that -- only outside review of this program." Well, we're the ones that are supposed to review this program, are we not, as representatives of the American people? Wouldn't you -- I mean, would you agree with that?

MR. WAINSTEIN: Yes, sir. And there's quite a bit of oversight from Congress. And as I mentioned earlier, there are number of different investigations being carried out right now by inspectors general and offices of trust and responsibility and the like, looking into the appropriateness of the Terrorist Surveillance Program, for --

SEN. SESSIONS: And some private lawsuit out here against companies for millions of dollars, filed by lawyers who could be lawyers associated with groups associated with terrorism,



is not the way to give oversight to the program like this, I don't think. Do you -- would you agree with that?

MR. WAINSTEIN: I go to this fundamental point, Senator, that these companies were operating at our request, upon our assurance. And so if there's a problem -- if people have a problem with it, if there's fault there, they should direct their concerns to the government. The government should be the ones who are called to answer and not the companies that were acting out of patriotic duty. SEN. SESSIONS: Yeah. Well, I'm also of the belief that -- I believe someone stated that the telecom companies would believe that indemnification is sufficient. My impression is, they do not. And they -- because they're still subject to the lawsuits. Do you have any information about that?

MR. WAINSTEIN: I don't have any direct information as to what their position is, except that I know they much prefer immunity, and I -- that's certainly our position. I believe, though, that they would see all the same problems with indemnification that I listed for your colleague.

SEN. SESSIONS: Well, I'm certain they would. It only makes common sense, and I believe in fact they don't think that's the best way, the indemnification approach is best.

Mr. Chairman, I will just offer for the record an op-ed in today's Wall Street Journal written by Benjamin Civiletti, a former attorney general under former President Jimmy Carter; Dick Thornburgh, former attorney general under former President Bush; and William Webster, former head of the FBI and the CIA, that testify to the importance of this legislation, and they strongly support the view that these companies that have cooperated should be protected from lawsuits.

They say they, the companies, quote, "deserve targeted protection from these suits," and point out that, "dragging phone companies through protracted litigation would not only be unfair but it would deter other companies and private citizens from responding in terrorist emergencies whenever there may be an uncertainty or legal risk," close quote. I would offer that for the record.

SEN. LEAHY: Thank you. Without objection, it will be part of the record.

I just want to make sure I fully understand. From your testimony, following on a question by Senator Sessions, has there been any suggestion, by any member of Congress of either party, that we should not be doing electronic surveillance of people who may pose a threat to the United States?

MR. WAINSTEIN: Not that I've heard, Chairman Leahy. In fact, I think what we're seeing now -- at least not in the course of this debate. What we're seeing now is, I think, a fairly good consensus in the American people and in Congress that we need the tool to do it and we should not have to get a court order if we're targeting persons outside the United States, with the exception --

SEN. LEAHY: I just don't want -- and I'm sure the senator from Alabama did not mean to leave the wrong impression here, but I certainly don't want any impression being here that -- I've

sat through hundreds of hours of briefings and closed sessions and open sessions on this. I have yet to hear any senator or any House member of either party say they feel that we should not be surveilling people who have positions inimical to the best interests of the United States.

SEN. SESSIONS: Mr. Chairman, let me just respond to that. I would say that this administration has been under severe attack for programs, including this program -- severe political attack, often from outside, sometimes within Congress. And by passing the Protect America Act and by the vote of the Intelligence Committee, this Congress has said, they are doing legitimate work, and we affirm their work.

SEN. LEAHY: I think this Congress -- many people were concerned that the White House was not following the law and wanted them to follow the law. I was concerned when the president of the United States said FISA was a law that -- basically unchanged since the 1970s. Of course, it has been changed 30 some-odd times since then. And I think that if there has been criticism, it's simply been that the United States, which stands for the rule of law, ought to follow the law.

MR. WAINSTEIN: If I may, Mr. Chairman --

SEN. SESSIONS: Well, I think we concluded that the president is following a law. That's why we've affirmed the program as it is presently being executed.

SEN. LEAHY: Mr. Wainstein?

MR. WAINSTEIN: I just want to say that my answer is related to, you know, when we talk about the program, the idea of doing foreign intelligence surveillance against persons overseas without going to the FISA Court first. And that is the -- that's been the area of disagreement. At least that's been hashed out in debates over the last month or two.

SEN. LEAHY: Senator Cardin.

SEN. BENJAMIN CARDIN (D-MD): Thank you, Mr. Chairman. And I particularly thank you for clarifying the record, because every member of Congress wants to make sure that we gather the information we need and want to make sure it's done in a way that's consistent with the civil liberties of the people in this country and the constitutional protections. And quite frankly, I think that by (complying ?) with that, the collection of information will be more valuable to our national security interests. So it's in our interest to do it for many reasons.

I want to question you on a couple points that you mentioned. You first talked about your concern about the sunset that's included in the Senate bill and the House bill. The Senate bill has a six-year sunset. The House bill has a two-year sunset.

And you then talk about your cooperation with Congress, making a lot of information available to us. I somewhat question whether we would have gotten the same level of interest by the administration in supplying information to our committees if there were no sunset included in the legislation, if we had a permanent extension of the law.

And secondly, I want you to comment on the fact, six years from now, can you anticipate what technology is going to be? It seems to me it's a good idea for us to be required to review this statute, not only because of the sensitivity on the civil liberties but also on the fact that technology changes very quickly, and we need to make sure that we have this law reviewed on a regular basis. So why isn't a sunset good?

MR. WAINSTEIN: Thank you, Senator. That's a good question. I've actually spoken quite a bit about the appropriateness or inappropriateness of sunsets.

I'm not reflexively resistant to sunsets at all. I think they actually have a very important place, and I think they had an important place with the Protect America Act. When Congress is in a position of dealing with an immediate need and legislating without maybe feeling like it has the time to go through and check the record and deliberate and debate completely, and look at all the angles, then it makes sense to have a sunset, just as we had in the Patriot Act, which was passed, I believe, six weeks to the day after 9/11, with a huge, you know, long -- large raft of new provisions. Sunsets were put in place there to make sure that Congress then had the time to go back and reevaluate things and make sure they didn't miss anything and see how these tools are being implemented.

The same thing with the Protect America Act. You all responded to the need in the summer. You put a sunset in place.

And I think we're going through a very healthy process right here. I think this is great.

SEN. CARDIN: Some of us think we need to continue that process.

MR. WAINSTEIN: And I think that's why we're not resisting the oversight, the very ample oversight and congressional reporting requirements in this bill. My feeling, however, is that once you've had that debate, go ahead and legislate. You don't need to put a sunset in. Congress can always re-legislate in FISA and has many times over the years.

SEN. CARDIN: And that's not all -- it's sometimes more difficult than it may seem. And when we're required to act, we act.

MR. WAINSTEIN: I understand that, but you've got to keep in mind there's a down side to that, too, because whenever you confer authorities, legal authorities, on law enforcement and intelligence community, that starts a process, which is a very in-depth process, of the agencies drafting policies, putting procedures in place, training people, and then when you have to shift gears --

SEN. CARDIN: I think we have -- I think Congress has the responsibility, and I think it's helpful for us to have the sunsets in law.

Let me go to the U.S. -- Americans who were targeted overseas and the amendment that was put on that you have concerns about. I quite frankly don't understand the concern here. It's

my understanding there's been published reports of how few people actually fall into this category. And it seems to me we always want to balance the rights of individuals versus the inconvenience or difficulty in complying with the probable cause standards. It seems to me here this is an easy one, that going and getting a warrant should be the standard practice.

MR. WAINSTEIN: Yes, Senator, and we've heard that view, you know, from a number of your colleagues. I guess -- keep in mind, as I explained earlier, there is a process in place by which we -- the attorney general personally made a probable cause finding for people overseas. The FISA Court did, on occasion, provide FISA Court authority for U.S. persons overseas because of the way the technology evolved since 1978. SEN. CARDIN: But I am correct; there's just a few number that falls into that category.

MR. WAINSTEIN: I can't go into the --

SEN. CARDIN: I thought there was some information that had been released on that.

MR. WAINSTEIN: I think there's been some public discussion about it, but I'd tell you, as I sit here right now, I'm not sure what I'm authorized to say or not say.

SEN. CARDIN: Well --

(Off-mike conferral.)

The director of National Intelligence evidently has said it. And it seems to me if he said it, then -- (chuckles) --

MR. WAINSTEIN: Right. Well, he has -- I think he has the classified authority that maybe I don't have. (Laughter.)

SEN. CARDIN: Okay. Well -- and his number, I believe, was the mid-50s, 55 or 56 people that actually were subject to this, which is certainly not a huge burden to get that information. And I think that's where you lose some credibility, when you have an issue that can be easily resolved, and yet you try to get the authority to avoid what seems to be core to American values, and that is having cause to get a warrant against an American.

Let me -- if I want to get to the immunity, and I don't have -- two minutes left, you -- and this is a difficult subject, and this is one that I think many of us are wrestling to try to get right.

You used the Good Samaritan analogy, where someone is on the scene of an accident and needs to respond quickly. And I can understand that being used on September the 11th. This program's been reauthorized for five years. Seems to me -- or six years. It seems to me that this is difficult to use that analogy when the telephone companies or servicers had plenty of change to review the circumstances and make independent judgment.

And I guess my point to you is, do you think the service providers have any responsibility to the privacy of their customers to make an independent judgment as to whether this information was properly requested?

MR. WAINSTEIN: The -- if I could just very briefly discuss the U.S. person overseas issue, just because I want to -- don't want to leave one thing hanging that -- I understand your concern. There are operational concerns that we have, especially about one aspect of that provision we'll need to discuss in classified session.

SEN. CARDIN: You mentioned that earlier.

MR. WAINSTEIN: There are also some issues that there's no emergency provision there.

Also, keep in mind that in terms of what is sort of the standard American approach, that requirement is not in place on the criminal side, on the criminal law enforcement side either. So that's -- I -- there's some question there about what is sort of more traditional or not.

But I would like to follow up with that, with you or anybody else, in a classified setting.

SEN. CARDIN: Certainly.

MR. WAINSTEIN: In terms of the obligation of the carriers, there are delineated, you know, legal obligations that carriers have.

SEN. CARDIN: They have a pretty big attorney staff -- legal staff.

MR. WAINSTEIN: They do. They do.

SEN. CARDIN: These are not unsophisticated companies. MR. WAINSTEIN: Yes, but I think -- I don't know if you actually saw the documents yesterday --

SEN. CARDIN: I have seen them.

MR. WAINSTEIN: The letters --

SEN. CARDIN: Yes, I have.

MR. WAINSTEIN: -- you know, the letters that were sent to the carriers explaining --

SEN. CARDIN: And I don't know -- if this is an inappropriate question, I'm sure you'll mention that. It seems to me that if I were the lawyer for the service providers, I would have asked for indemnity. I mean, these are sophisticated companies. So they're -- they can make independent judgements. I understand the concern on September the 11th, but this has been going on for many years. I find it hard to believe that a large companies with big legal staffs never ask for more protection or more information.

MR. WAINSTEIN: Well, I can say that as this -- the bill out of the Senate Intelligence Committee reflects, there are certain common-sense criteria you'd look at for them to have a suitable reliance on the government in going forward and assisting the government. They -- if you look at those documents -- I can't get into the classified nature of them, but you'll see that those assurances are there. I think they operated on a good-faith basis. And I don't know that we want the legal staffs of all these communications providers putting us through the paces and litigating everything. And as you know, under this legislation, as in -- under the Protect America Act, these carriers can challenge every one of the directives we give them and really slow down our operations. So I don't know that we want to encourage that -- in fact, I think we want to not encourage it by alleviating any possibility of retroactive liability.

SEN. CARDIN: Thank you, Madame Chair.

SEN. FEINSTEIN: Thank you, Senator.

Senator Cornyn is next up.

SEN. JOHN CORNYN (R-TX): Thank you, Madame Chairman.

Mr. Wainstein, the Protect America Act sunsets in February. Is that correct?

MR. WAINSTEIN: I believe it's February 1st, sir.

SEN. CORNYN: And that's the law that Congress passed, this Congress, that said if it's two terrorists talking to each other overseas, that we don't need to get a warrant to intercept that information. Correct? MR. WAINSTEIN: If we're targeting our surveillance at a person overseas, we don't have to go to the FISA Court before doing it.

SEN. CORNYN: And you're asking here today for a permanent extension of that law, which Congress has already passed. Correct?

MR. WAINSTEIN: Yes, sir, basically to bring it back in line with what was the original intent of FISA back in 1978.

SEN. CORNYN: And let me take this down to a particular scenario or set of facts that I think will help us understand what a burden the need for a warrant can be between -- when it comes to communications between terrorists overseas.

On October the 16th the New York Post reported a story about -- involving some soldiers who were in Iraq and were killed by al-Qaeda operatives -- four killed, and three were then kidnapped, including Alex Jimenez from Queens. And later, as a result of the search to find the three kidnapped soldiers, one of my constituents, Ryan Collins, 20 years old, of Vernon, Texas, lost his life.

But the timeline here I think is significant because at 10:00 on May the 15th, after these three soldiers were kidnapped, U.S. officials came across leads that show a need to access to

Signals communications (sic); and the NSA at 10:52 -- 52 minutes later, notified the Department of Justice that under existing FISA law a warrant was needed to eavesdrop because the communications passed through United States infrastructure, even though it was communications overseas between two foreign nationals.

It then took until 12:53 p.m. for lawyers and intel officials to begin to work to confirm the probable cause necessary to identify the kidnappers as foreign insurgents, and, therefore, a legitimate target of American surveillance. Then, almost five hours later, at 5:15 p.m., the lawyers were able to file the paperwork necessary to request the emergency surveillance.

Finally, at 7:18 p.m. that night, almost 10 hours later, the attorney general of the United States approved the emergency surveillance based upon the belief that FISA Court would grant the warrant radioactively within one week. So nine hours and 38 minutes after three American soldiers were kidnapped -- and after it became apparent that there was Signals Intelligence that might help identify who their kidnappers were, and where these American soldiers were located - - it took almost 10 hours to get the necessary paperwork done by the lawyers at the Department of Justice in order to get the approval for the kind of surveillance that was required.

Is that the kind of impediment or barriers to Signals Intelligence surveillance that you are asking that the Congress avoid and eliminate, so we can, hopefully, save American lives?

MR. WAINSTEIN: Absolutely, Senator Cornyn. That particular incident -- obviously it's classified, there's only so much I can say about it -- it was a bit unique in the sense that there were some very novel issues of law there. However, even if you take it out of that context so that I don't step in classified matters, into any emergency authorization context there is a provision that allows us to have the attorney general -- and now delegated to me, authorize surveillance on emergency basis.

Within three days, however, we have to go to the FISA Court with a big package of materials and persuade the FISA Court there's probable cause that the person we're surveilling, who might well be outside the United States, is an agent of a foreign power. So we have to have all that probable cause before the attorney general makes his determination. It then has to be put into a package and satisfy the FISA Court or else there are consequences.

That all takes resources. It also means that there are people who are legitimate targets overseas against whom we just can't make probable cause that they are agents of a particular foreign power. And we can't surveil them at all. So it's not only an impediment in terms of it takes time, it takes resources, but it's precluding us -- or it did preclude us from surveilling legitimate targets overseas. -- (inaudible) --

SEN. CORNYN: Mr. Wainstein, you, of course, were talking about matters that are both public and some classified -- which we are not going to talk about, but I would just want to stress the timeline that I provided to you was in published new reports. And I'm not asking you to confirm or deny that timeline, but the report, according to the -- to the New York Post was that it took 10 hours later.

And my constituents in Texas, the parent of this young corporal that lost his life searching for these three American soldiers who were kidnapped, and whose discovery was delayed by 10 hours because of the red tape necessitated by the interpretation of the FISA law, I believe contributed to this young soldier's death.

MR. WAINSTEIN: Absolutely.

SEN. CORNYN: And that's just simply unacceptable, and I think it ought to be unacceptable to every American. When we are at war, to handcuff our American military and intelligence officials in this unacceptable way -- I just, to me it's a no-brainer. And I just -- I fail to understand the -- why we need to guarantee full-employment-act for lawyers in order to fight a war.

Let me ask you, there's been some question about the radioactive immunity for the telecoms who have participated in the intelligence surveillance that you described earlier. And there was some question whether we ought to cap damages, whether we ought to give them -- grant them some sort of reimbursement for their attorney's fees and other costs.

But there are more other tangible consequences associated with litigation which could be avoided. And I suggest to you that during General -- excuse me, Judge Mukasey's testimony we talked about the fact that during the 1993 trial involving the World Trade Center, where the trial of Omar Abdul-Rahman -- the so-called Blind Sheikh who conspired to bomb the World Trade Center -- that a list of 200 unindicted co-conspirators was disclosed to defense attorneys and later found its way into the hands of Osama bin Laden in the Sudan, bin Laden was, of course, on the list.

Does that highlight one of the other risks attendant to litigation of this nature involving classified materials that sensitive classified information might find its hands into the -- into the hands of our enemy?

MR. WAINSTEIN: Yes, absolutely. Now of course that's a different context. The criminal context we have -- we discussed with Senator Specter the Classified Information Procedures Act which helps us there, but still even in that situation you had a disclosure of very sensitive information which was very detrimental to our effort against our enemies.

That is -- we're concerned that that's going to happen even doubly in this litigation. And my understanding is there are 40 some cases right now around the country, and with all those cases running we're very -- gravely concerned that sources and methods will be disclosed.

SEN. CORNYN: Thank you very much.

Thank you, Madame Chairwoman.

SEN. FEINSTEIN: Thank you, Senator.

Senator Whitehouse.



SEN. WHITEHOUSE: (Off mike.) Thank you, Madame Chair.

(Off mike.) Just so it's clear what we're talking about, because I think everybody agrees that we don't want to handcuff our military and our security intelligence forces when they're out hunting foreign terrorists. The Patriot -- the Protect America Act, as it passed by this Congress back in August, would allow no restriction -- or would establish no restriction on our intelligence agencies once a person was reasonably believed to be outside the United States. Correct?

MR. WAINSTEIN: Yes, sir. There were various criteria that we had to satisfy before the DNI and the attorney general could issue a certification, but once -- the key finding was that the person who we're targeting with surveillance was outside the United States.

SEN. WHITEHOUSE: Was reasonably believed to be outside the United States. And that category, "reasonably believed to be outside the United States," would include a family on vacation in the Caribbean -- an American family, all citizens, on vacation in the Caribbean? That category. MR. WAINSTEIN: If there is a foreign intelligence purpose to that surveillance, and if we demonstrated that that person or that family was an agent of a foreign power, yes.

SEN. WHITEHOUSE: Where, under the Protect America Act do you have to demonstrate that they're an agent of a foreign power?

MR. WAINSTEIN: That's -- that's under the 12333, the Executive Order.

SEN. WHITEHOUSE: Exactly. It's not under the Protect America Act. There's nothing in the Protect America Act that would prevent the intelligence apparatus of the United States from surveilling American citizens on vacation in the Caribbean. Correct?

MR. WAINSTEIN: One of the criteria is that there's a foreign intelligence purpose -- this is in the statute, to that surveillance, and we have to meet that.

SEN. WHITEHOUSE: That's rather broadly defined, isn't it?

MR. WAINSTEIN: Well, I think --

SEN. WHITEHOUSE: And there's no judicial review of that determination is there?

MR. WAINSTEIN: Well, the judicial review of the procedures by which we --

SEN. WHITEHOUSE: But not judicial review of the determination that that family vacationing in the Caribbean is being surveilled for an intelligence purpose.

MR. WAINSTEIN: Well, there -- obviously directives can be challenged. Congress set up a mechanism by which they can be challenged, so, you know, there is court review there. But in terms of going to the court --

SEN. WHITEHOUSE: You must be reading a different statute than I am. I find no place in which a directive is required from a court authorizing -- a family vacationing in the Caribbean, or a businessman traveling to Canada, or somebody visiting their uncle in Ireland from being surveilled by the United States. The FISA Court is stripped of that jurisdiction by that statute, is it not?

MR. WAINSTEIN: But the FISA Court -- right, the FISA Court reviews the procedures by which we determine -- (inaudible) -- those people outside the United States, and --

SEN. WHITEHOUSE: Right, but they don't review the determination.

MR. WAINSTEIN: They do not give us approval up-front, and that's the difference.

SEN. WHITEHOUSE: Right. I think that's an important point. And I think what we're trying get at here is, what is the best way to protect Americans when they're happened to be traveling abroad? This is a different world now. People travel all the time for all sorts of reasons. And I don't think anybody in America believes that they give up their Constitutional rights the instant that they cross the border.

You indicated that you thought that there was a difference between whether you're in the country, or outside of the country, in the criminal law as well. Has the Department of Justice -- the United States Department of Justice ever wiretapped an American citizen outside of the United States in a criminal investigation without a court order?

MR. WAINSTEIN: I honestly don't know, historically, what the Department has authorized or not. What I'm talking about, though, is that, as you know --

SEN. WHITEHOUSE: Are there any American citizens presently being surveilled by the Department of Justice, outside of the United States, without a court order in a criminal investigation?

MR. WAINSTEIN: I wouldn't know. And I'm going to be careful because I just don't know, Senator. But the point I was --

SEN. WHITEHOUSE: Do you take those two questions for the record, please?

MR. WAINSTEIN: I would be happy to take them --

SEN. WHITEHOUSE: Okay.

MR. WAINSTEIN: -- (inaudible) -- get back to you.

The point I was making earlier, sir, is that, as you know, in the criminal context, there is not a warrant mechanism whereby a judge would issue a warrant for a search in Bangladesh or Buenos Aires, or whatever. And my point is just that, the fact that there isn't one on the national security side is not that striking because there's not such a mechanism on the law enforcement side either. That was my point.

SEN. WHITEHOUSE: It strikes me, though, as we're trying to resolve these difficult issues where we're balancing the interests of an American citizen -- on vacation in Caribbean, or traveling to visit their uncle overseas in Canada, or whatever, against the absolute necessity that we have the tools that we need to combat the threat of agencies and organizations abroad that wish to do us harm.

Do we have a reasonably good model, in the balance that's been struck on the domestic side -- through both the warrant requirement on the one hand, and the minimization rules that protect to protect the people who aren't the target but happen to talk to the target, on the other hand -- as a general proposition, and allowing for the fact that there are going to be matters of fine legislative language, and unintended consequence, and so forth -- as a general proposition, does the Department of Justice agree that that is a useful and important benchmark in evaluating whether we've succeeded in striking that balance?

MR. WAINSTEIN: I guess I'll draw on my personal experience, sir. I -- like you and a number of members here, I was a criminal prosecutor for 15 years of my career, and I used Title III, I used the regular warrant requirement in domestic law enforcement. It's what I was accustomed to.

After 9/11, I got into the national security game and started seeing what was necessary. And, frankly, I don't think that that construct would work. It simply would not work given the volume, diversity of communications that we need to intercept, the nimbleness with which we need to act to protect --

SEN. WHITEHOUSE: Wouldn't work for who? We have the director of National Intelligence said that Americans targeted abroad numbered 56. That is not in the context of our enormous defense effort against terrorism in the context of our enormous -- I think \$40 billion-plus, was recently declassified by the DNI intelligence effort against terrorism, to pay for having people put together packages for 56 folks, so that an American who travels abroad knows that they enjoy the warrant requirement, doesn't seem to be the kind of interference that you're suggesting.

Why is it that putting together a package for 56 people is such a -- would so offend that balance, in your view?

MR. WAINSTEIN: No, I'm sorry, I was talking about a benchmark for Signals Intelligence, period, on the national security side. SEN. WHITEHOUSE: I'm talking only about American citizens.

MR. WAINSTEIN: In terms of Americans, I --

SEN. WHITEHOUSE: When they travel abroad.

MR. WAINSTEIN: I recognize that they're -- that's a different kettle of fish, and there are different rights implicated. And my --

(Cross talk)

SEN. WHITEHOUSE: In fact, as far as we know, the United States Supreme Court might very well say that they have a warrant requirement (right ?), it's never been decided otherwise, has it?

MR. WAINSTEIN: No, you're right. It hasn't been decided. The problem is there are operational concerns. One of the concerns, for instance, is in the amendment that passed there's no emergency provision for going -- for going up and surveilling a U.S. person overseas without going to the FISA Court. So you have --

SEN. WHITEHOUSE: I'm with you on emergencies. My time has run out.

I thank the chair.

MR. WAINSTEIN: So I would be happy to brief you on other operational concerns we have about certain aspects of this -- of the amendment.

SEN. WHITEHOUSE: We are in active discussion.

MR. WAINSTEIN: Thank you, sir.

SEN. WHITEHOUSE: Thank you, Madame Chair.

SEN. FEINSTEIN: Thank you, Senator Whitehouse.

Senator Graham.

SEN. GRAHAM: Thank you. -- (inaudible) -- it's broke. Now, there we go.

Thank you very much for your service to our country in many capacities. We have two concepts that -- been competing against each other since 9/11, and I've somehow been able to make everybody on both sides mad at me at one point in time.

The first concept is that we're at war, which I agree. And some people in the administration had the view that when we're at war there's only one branch of government. And that's one of the reasons we've had this big fight, is because we've been fighting against a theory of the Executive Branch, in a time of war, that said there's no need for FISA or any other check and balance.

Did you ever feel comfortable, personally, with the idea that when we authorized the use of force -- Congressional use of force regarding Iraq, that the Congress intentionally gave you the authority to avoid compliance with FISA?

MR. WAINSTEIN: I've read the argument that the AUMF, right in the aftermath of 9/11, -

SEN. GRAHAM: I mean, do you personally feel comfortable with that legal reasoning?

MR. WAINSTEIN: I'd have to say -- and I'm not just trying to hedge, but I'd have to say that I'd have to really go back and dig into it, because it's a complicated matter and I don't pretend to be a Constitutional scholar on these separation of powers issues, at least not -- I don't have it at my fingertips.

SEN. GRAHAM: I just want you to understand -- and I think you've been a very good witness, that one of the conflicts we've had is that I'm a conservative -- want to win the war as much as anybody else, but one thing that conservatives and liberals have in common is a concept of checks and balances. That, you know, we can have military -- see, I think we're at war in the military should try these people that are caught -- who are suspected of war crimes, but there's a process that you go through with court review.

So that's one concept that I think is now behind us. So I want to put on the record that I appreciate the administration's willingness to abandon that theory, sit down with us and try to find a way to comply with FISA.

Now we've got another concept that I think is rearing its head in this debate, is that you're trying to apply domestic criminal law to a war-time environment. And I have been arguing very ferociously that we're dealing with an act of war after 9/11, and the Law of Armed Conflict applies, not domestic criminal law.

I'm the first one to say you cannot hold someone indefinitely under domestic criminal law without a habeas petition, or some court date. But we're not dealing with common criminals, we're dealing with warriors who can be kept off the battlefield, under the Law of Armed Conflict, for an indefinite period -- because it would be silly to release people back to the fight who've vowed to kill you.

Now looking at FISA from those two concepts, the Protect America Act, I think, has found a sweet-spot, as far as I'm concerned. And the general idea that you would need a warrant to surveil the activity of a enemy-combatant, justifies all the -- all the laws of armed conflict.

So as I understand this compromise we've reached, if you find, or we find someone we suspect of being part of the enemy force, we have the ability to listen in on those communications under the theory that we're -- that we're surveilling somebody who's part of the enemy. Is that correct? I mean, that's why we're following these people.

(Cross talk.)

MR. WAINSTEIN: -- for foreign intelligence purposes, yes.

SEN. GRAHAM: Yeah. We're not following them for crime purposes, we're following them because we're at war. MR. WAINSTEIN: It's a -- it's a matter of national security and foreign intelligence, yes. I mean, they can -- that person can also be committing a crime at the same time, and, of course, international terrorists are both a national security threat as well as a criminal threat.

SEN. GRAHAM: Right. Now when an American's involved -- here's where I think we need a warrant: If someone's calling me from overseas, and you think the person calling me is a terrorist, I don't mind you listening in to what's being said. But if you believe I'm helping the enemy -- and this gets back to your question, that I'm somehow part of a fifth-column movement, I want you to go get a warrant because you'd be wrong.

And we've had examples of people -- since 9/11, anthrax -- suspected of doing something; the government followed them around and nothing ever happened. I don't think it's a burden for the administration -- this administration or any other administration, at a point in time, to go to a court and say, we believe Lindsey Graham is involved with a terrorist activity. Do you think that's a burden?

MR. WAINSTEIN: No, that's a burden actually that -- (inaudible) -- sir, because according to the legislation that came out of Senate Intelligence Committee, if we want a target -- when we get to a point where we're targeting somebody in the United States --

SEN. GRAHAM: Right.

MR. WAINSTEIN: -- this is actually on the original FISA that continues through the Protect America Act -- we have to go to the FISA Court.

SEN. GRAHAM: And that's really not a burden, is it?

MR. WAINSTEIN: Well, it's a burden, but it's a burden that we assume, and that we feel is appropriate, and that we're willing to carry on.

SEN. GRAHAM: If you'd have said that three years ago we wouldn't be doing all this.

Now, to my friends who want to expand it overseas, I think you are creating a burden. As much as I like Senator (Biden ?), we are at war. And I do believe that his amendment is expanding FISA, and doing the same type harm as if you never had to go through FISA. As much as I appreciate him, like him, and understand that he's doing this for all the right reasons, I hope we will find a way not to impose that burden upon our nation at a time of war. And that's just my comment, not a question.

Finally, about the retroactive -- the liability of people who've helped us. What effect, if any -- a chilling effect, if any, would it have, that if a company is held liable or can go to court by answering a request of their government with a document that says this is a legal request -- what type of effect would it have in the future, of the ability of this country to go get people that -- to help us?

MR. WAINSTEIN: Yeah, from my personal, sort of parochial perspective, that's the big concern because, you know, I'm in a division of people who our job is to enable the intelligence community to do fast, flexible surveillance when it's appropriate.

And we're concerned that, you know -- companies are rational beings, they say, okay, we cooperated before, we then got taken into court, and all the different damage that goes along with that. Next time you come to us, it doesn't matter how good the form is that you give us, how strong the assurance the is, we're going to go ahead and litigate it all the way out to the nth degree to make sure that we protect ourselves and don't end up in court later on. That, then, delays our ability to go up and conduct the surveillance we need.

SEN. GRAHAM: To my colleagues on the committee who think we're letting someone off the hook, I respectfully disagree. If we go down this road of holding people liable for answering a request of our government to help in a time of war, we're probably hurting ourselves, not letting someone off the hook.

Thank you.

MR. WAINSTEIN: Thank you.

SEN. FEINSTEIN: Thank you very much, Senator Graham.

Senator Durbin.

SEN. DURBIN: Thank you, Madame Chair.

Mr. Wainstein, when I use this little piece of technology to make a phone call or to send an e-mail message, I think I have a reasonable right to expect that that communication, and my identity, are going to be protected, confidential, private -- except with some notable statutory exceptions.

If the company that I'm doing business with receives a warrant to search or obtain records, that's understandable. At that point, their obligation to me as a customer is secondary to this warrant that they've received.

Now in this context of national security, under the statutes written, there's a second possibility. And that is, in addition to a warrant there could be the so-called certification, that the government has the right to request this information that -- who I am, and what I said, what I did. Now you've stated this in the most general terms in your testimony, in terms of the responsibility of the telecommunications provider to me, or any other customer, and you said, "The committee's considered judgment reflects a principle in common law that private citizens who respond in good faith to a request for assistance by public officials should not be held liable for their actions."

And so let me ask you this: In the course of our government's reaching out to telecommunications providers, asking for information about communications for the purpose of national security, did any of those telecommunications providers refuse to cooperate -- refuse to provide the information?

MR. WAINSTEIN: Senator, I'm just not going to be at liberty, or equipped for that matter, to answer that question. Obviously it's classified. I wasn't even around during most of that time, at least in the -- in Main Justice. But I think that's something that you -- I'm not sure if you went to the hearing yesterday -- or the briefing yesterday, but colleagues of mine were up there yesterday explaining the chronology and the history of the whole program, Terrorist Surveillance Program, the interaction with the providers, and we would be happy to come up and answer any more questions.

SEN. DURBIN: So in order to protect what was said at that hearing, let me continue on in a hypothetical way -- noting that there has been one telecommunications provider, through one of its officers, who has reported publicly that they refused to cooperate. But let me ask you this, if the question is good faith on the part of the providers, and we come to learn that a telecommunications provider refused to cooperate, saying that the certification that was provided by the government was not adequate under the law, is that something we should take into consideration?

MR. WAINSTEIN: In deciding what sort of immunity, and whether or not --

SEN. DURBIN: In deciding whether or not it's a good-faith effort by a company to cooperate with government.

MR. WAINSTEIN: Well, not knowing the fact and not being able to -- (inaudible) -- I knew them. I mean, the fact that a company refused doesn't necessarily make the rightness of their position.

What I -- what I see is that there were letters that went out to these companies that said very forcefully, this is being directed -- this is directed by the president, and this has been deemed lawful at the very highest levels of the government. And that's a pretty strong assurance.

And so I guess, in terms of good faith, that's very strong evidence of good faith. The fact that one company refused to cooperate -- if that's, in fact, the case, I don't think that necessarily undercuts the strength of those assurances.

SEN. DURBIN: I disagree. If a telecommunications provider looked at the same certification as another telecommunications provider, and concluded it was not sufficient under the statute to waive that company's responsibility to protect the privacy and communications of its customers, I think that's relevant to the discussion here.

And assuming, for the sake of discussion, that this company that has already publicly disclosed what happened is factual in what they've said, we at least know that one



telecommunications provider took a look at what was being said, and said, that's not good enough, I have a responsibility to my customers to protect their identity.

So that raises a question of fact, doesn't it -- as to what is good faith and what isn't? Which company operated in good faith? Where do we resolve questions of fact in America? Questions of fact in law are resolved in court. And what you're suggesting from your testimony is, "We don't want to resolve this. We don't want to have these telecommunications providers held accountable to explain their conduct." Now that troubles me. It troubles me because, from my point of view, it's going to have a chilling effect on the relationship of telecommunications providers, their customers, and our government.

How much can I trust in the future if I know that telecommunications providers can disclose my conversations, information about me, with impunity, with immunity, under the law? What do you think? MR. WAINSTEIN: Well, Senator, thanks for that line of questions.

Back to the fact that one company might have refused -- and keeping it in the abstract, I don't know the facts, it can be characterized that they did a good-faith job, and they determined that this wasn't good for their -- this wasn't sufficient.

It also could be an example of the phenomenon I just described to Senator Graham, which is a company saying, "Boy, I'm just not going to go out -- I'm not going to do anything to assist the government. I'm just going to play it easy, go into my cell, and not -- and not try to help because I'm going to be risk-averse." Well, the problem is is that the more that these companies are exposed, the more you're going to have companies doing exactly that.

Now I don't know what the thought process was in this particular case, but I'm saying that it could be --

SEN. DURBIN: Interesting --

MR. WAINSTEIN: -- it could be looked at that way.

SEN. DURBIN: Interesting and relevant question, isn't it? The -- (inaudible) -- usually resolved in a court, by a judge. And the point that was made earlier by Senator Leahy, is that some moment in time, after the public disclosure of the so-called secret program, our government decided, you know, the safest thing to do is to go through the FISA Court. If we hand them a court order, we don't have to worry about whether or not this authorization document is really going to carry the day.

That, to me, was a conclusion and admission of the obvious. And that is an admission which, I think, shows where our government should have been from the start. They knew that if they went through the FISA Court with a court order, the telecommunications provider would have no argument. But when you get to this so-called authorization, there clearly was an argument, at least for one telephone -- or telecommunications provider.

So, you know, it strikes me as strange, middling-strange here, that we're in a position saying that this company that is supposed to protect my identity, and my communications, if it asserts my privacy -- my right to privacy over a government request, that somehow they're obviously not doing their, quote "patriotic duty" -- that's how you referred to it, "their patriotic duty."

It's even been suggested by one of my colleagues here that these lawyers bringing this lawsuit, we got a question whether they might be connected with terrorist organizations -- remember that? Remember that statement that was made earlier? Hasn't this gone pretty far afield from the fundamental question, the conflict between privacy and security? Isn't it reasonable to say, that company has a statutory and personal obligation to me to protect my identity, and only to give it up for a legitimate statutorily-recognized purpose -- a court order or a certification that they can stand behind?

MR. WAINSTEIN: I don't -- just to, just to be clear, I've not heard, and -- (inaudible) -- in the newspapers, of bad faith on the part of any companies. And I don't -- and we're not trying to suggest -- I'm not suggesting that at all. I think, actually the companies acted in good faith, and I do believe they acted out of patriotic duty, or a sense of patriotic duty.

I think though that the legislation now that Senate Intelligence ( ?) -- (inaudible) -- (and ?) the Senate Intelligence bill, I think is a good middle ground where it gives targeted immunity for the events after 9/11 -- where companies did act on these assurances, but then lays out, prescribes a course for those kind of defenses in the future.

And there's a second part which does that, which I think is quite sound because it says, look we're going to deal with this one-shot problem, post-9/11 -- between 9/11 and when we went to the FISA Court, or got FISA Court approval -- but then from here on out, this is the mechanism that we're going to use, and we'll do that without having to resort to the -- (inaudible) -- . I think that's a very sound approach.

SEN. DURBIN: Thank you very much.

Thank you, Madame Chair.

SEN. FEINSTEIN: Thank you, Senator. And thank you, Senator -- Mr. Wainstein.

Senator Hatch has not yet had his first round, but before turning to him, I'd like to state what the chair's intent is -- and if anyone disagrees, please let me know. I'd like to go to 1:45, and we have a second panel. We'll ask the panelists to think about their remarks -- we have their written remarks, summarize them and then limit the rounds to a strict five minutes, if that's agreeable with everybody.

Hearing no objection -- I meant 12:45, excuse me -- hearing no objection, that's the way we'll proceed.

Senator Hatch, it's all your's.

SEN. HATCH: Well, thank you, Madame Chairman, I appreciate it.

You know, I'm sorry to keep you a little longer, but the current bill provides authorization for the attorney general and the director of National Intelligence to direct, in writing, an electronic communications service provider to provide the government with all information, facilities, and assistance necessary to accomplish authorized acquisition. However, I don't see that the bill language has specific non-disclosure language for these likely classified directives. Can you research whether this is needed and provide an answer for the committee's consideration of the bill?

MR. WAINSTEIN: (Off mike.) -- (inaudible) --

SEN. HATCH: Okay, if you would. Now there have been some suggestions to have the FISC assess compliance with the targeting and minimization procedures. There are numerous oversight mechanisms in this bill already, and wouldn't this put the FISC in a position where it is making foreign intelligence determinations in place of analysis?

MR. WAINSTEIN: (Off mike.) -- (inaudible) -- I'm sorry. And that is the problem. And it would get the FISC in a position of being operational to the extent that it's not when it assesses compliance for, let's say, the minimization procedures in the typical, traditional FISA context where you're talking about one (order ?), one person.

Here some of our orders might well be programmatic, where you're talking about whole categories of surveillances, and that would be a tall order for the FISA Court to assess compliance.

SEN. HATCH: That's my understanding. The House bill on FISA requires that the FISC approve any foreign targeting before it occurs. And we need to remember we're talking about foreign targets that are overseas. And from the Department of Justice's perspective, what are the negative consequences of prior approval?

MR. WAINSTEIN: It's just prior approval raises a host of issues, 1) We might not get the approval, and that could slow things down. The House bill actually says that if, at the end of 45 days, the court hasn't ruled, our surveillance has to go down. There is an emergency procedure, but it goes down and we lose it. There's not even a mechanism for surveillance remaining up as we appeal a declamation by the FISA Court.

And we've seen over time, as the -- as we discussed earlier, as FISA has migrated -- the jurisdiction of FISA has migrated to surveillances outside the United States, with the change in technology since 1978, more and more have had to go to the FISA Court to get approval at the front end, and more and more -- that's more and more burden on us, and --

SEN. HATCH: And it always takes a considerable amount of time to go through the FISA procedure, sometimes less than others, but if it's -- if it's a serious request it can take a number of days, couldn't it?

MR. WAINSTEIN: Yes, it can take a long time, it could also take a lot of person hours because you have to put together a lot of paper -- SEN. HATCH: So we could lose the intelligence that really might protect our country?

MR. WAINSTEIN: That's the concern, yes sir.

SEN. HATCH: That's my concern. Other legislative proposals relating to FISA modernization have called for a narrow definition of foreign intelligence information applying only to international terrorism. Now please provide an explanation of the flaws in this suggestion, and how this type of unnecessary limitation could facilitate our intelligence community missing the next threat.